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9 IN THE UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN JOSE DIVISION

13 FELTON A. SPEARS, JR. and SIDNEY )  
14 SCHOLL, on behalf of themselves and all others )  
15 similarly situated, )

15 Plaintiffs,

16 vs.

17 FIRST AMERICAN EAPPRAISEIT )  
18 (a/k/a eAppraiseIT, LLC), )  
19 a Delaware limited liability company, )

19 Defendant.

Case No. 5-08-CV-00868 (RMW)

NOTICE OF MOTION AND MOTION FOR  
ORDER REQUIRING OBJECTOR LARRY  
ELLIS TO COMPLY WITH THE COURT'S  
ORDER PRELIMINARILY APPROVING  
SETTLEMENT AND APPEAR FOR HIS  
DEPOSITION AND SETTING A HEARING  
TO SHOW CAUSE WHY LARRY ELLIS  
HAS STANDING TO OBJECT

Honorable Ronald M. Whyte

Date: May 8, 2015

Time: 9:00 a.m.

Courtroom: 6, 4<sup>th</sup> Floor

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

2 **I. INTRODUCTION**

3 Plaintiff seeks an order requiring Larry Ellis, the lone objector to the proposed Class Action  
4 Settlement of this action, to comply with this Court's December 12, 2014 order that requires any  
5 objector to the Settlement to provide a date when he could be available for a deposition to provide  
6 discovery regarding the basis for any objection he made. Mr. Ellis' deposition here is warranted  
7 given that, based upon Plaintiff's investigation, Mr. Ellis **lacks standing** to object to the Settlement  
8 based on the information he has provided. Mr. Ellis' name is not on the Revised Class List which  
9 identifies all Class Members, meaning he is not a member of the Settlement Class and has no  
10 standing to object. Mr. Ellis' name and address also do not appear on the larger list of all class and  
11 non-class services defendant First American eAppraiseIT ("EA") provided for Washington Mutual  
12 Bank ("WMB"), and Mr. Ellis' loan number does not appear within any of the spreadsheets provided  
13 by JPMorgan Chase Bank ("Chase") of all class and non-class persons with WMB loans that had  
14 services provided by EA. Accordingly, not only is Mr. Ellis not a Class Member, but all indications  
15 show EA did nothing for WMB in connection with Mr. Ellis' loan.

16 Given that all of the records show Mr. Ellis is not a Class Member and has no standing to  
17 object, Plaintiff asks that the court Order Mr. Ellis to comply with the Preliminary Approval Order,  
18 and make himself available for a deposition of four (4) hours to explore the basis for his objection  
19 claiming he is a class member and for him to provide at that time any evidence demonstrating he has  
20 standing to object to the Settlement. Additionally, Plaintiff asks the Court to hold an evidentiary  
21 hearing at the same date and time as the Final Fairness Hearing where Mr. Ellis can appear and  
22 present any evidence he has to show he has standing to object to the Settlement, and Plaintiff will  
23 provide the evidence he has showing Mr. Ellis is not a Class Member.

24 **II. FACTS**

25 On December 12, 2014, the Court entered an Order Preliminarily Approving a Class Action  
26 Settlement ("Preliminary Approval") of this action, and certifying the Settlement Class. Dkt. No.  
27 588. As part of the Preliminary Approval Order, the Court directed that any objectors to the  
28

1 Settlement provide two available dates when they would be available for a deposition between seven  
2 (7) and twenty-one (21) days prior to the Final Fairness Hearing. *Id.* at ¶ 31.

3 The members of the Settlement Class are well-defined and their names and addresses are  
4 known. The Settlement Class was defined and encompassed by the Revised Class List. Dkt. No.  
5 584-1, Amended Stipulation of Settlement, ¶¶ 26, 30. Notice of the Settlement was sent to  
6 Settlement Class Members' last-known addresses. Dkt. No. 597, Affidavit of Tore Hodne, ¶¶ 8-9.  
7 Only Settlement Class Members, defined as all persons on the Revised Class List, are bound by the  
8 terms of the Settlement including any release of claims thereof. Dkt. No. 584-1, Amended  
9 Stipulation of Settlement, § XII.

10 The Revised Class List includes only those persons that Plaintiff was prepared to present at  
11 trial and seek a liability judgment for (*i.e.*, persons with RESPA qualifying personal loans for whom  
12 EA performed an appraisal). Dkt. No. 584-01, Amended Stipulation of Settlement, ¶¶ 26 and 30.  
13 All other persons who took out WMB loans were not included in the Settlement. Thus, persons who  
14 are not Settlement Class Members include persons with WMB loans whose appraisals were  
15 performed by Lender's Services, Inc. ("LSI") or WMB itself with its in-house appraisers, as well as  
16 those non-RESPA qualifying WMB loans for which EA provided some form of service, including  
17 former plaintiff Sidney Scholl.

18 On March 20, 2015, Larry Ellis filed the sole objection to this Settlement, providing his  
19 name, WMB loan number, and address (2040 Laguna #402 San Francisco, California). Dkt. No.  
20 598. In violation of this Court's Preliminary Approval Order, Mr. Ellis did not provide dates when  
21 he could be available for a deposition, or full disclosure about his or his counsel's past representation  
22 of class action objectors. *Id.* at 4-5. Neither Mr. Ellis' name nor his address provided in his  
23 objection appears on the Revised Class List, meaning Mr. Ellis is not a Settlement Class Member.  
24 *See* Declaration of Wyatt A. Lison ("Lison Decl."), ¶¶ 5-8, filed herewith. Without being a  
25 Settlement Class Member, Mr. Ellis has no standing to object to the Settlement.

26 Not only does Mr. Ellis name and address not appear on the Revised Class List, neither his  
27 name nor his address appear on the larger list of all services EA provided to WMB. Lison Decl., ¶ 9.  
28 Mr. Ellis' name, address and loan number also do not appear within the spreadsheets provided by

1 Chase of persons who had WMB loans based on any services provided by EA. Lison Decl., ¶ 9.  
2 Thus, not only is Mr. Ellis not a Settlement Class Member with standing to object as he is not on the  
3 Revised Class List, but also according to the records produced in this action EA provided no services  
4 to WMB related to Mr. Ellis, his home or his loan.

5 Plaintiff attempted on seven occasions, unsuccessfully, to serve Mr. Ellis with a subpoena at  
6 the address provided in his objection. Lison Decl., Ex. 1. On March 27, 2015, Plaintiff's counsel  
7 informed Matthew Kurilich, Mr. Ellis' counsel, that Mr. Ellis is not a Settlement Class Member for  
8 the reasons stated above. Lison Decl., Ex. 2. Mr. Kurilich responded by email on March 28, 2015  
9 asking if the defendant could provide a report regarding Mr. Ellis' loan number, even though EA  
10 was not the lender and has no loan information independent of what was provided in this action by  
11 Chase. Lison Decl., Ex. 3. Mr. Lison responded to Mr. Kurilich's email explaining that Plaintiff  
12 could not get the information from the lender (*id.*), and spoke with Mr. Kurilich regarding Mr. Ellis'  
13 objection three times on March 30, 2015 to explain why Mr. Ellis is not a Settlement Class Member  
14 and does not have standing to object to the Settlement. Lison Decl., ¶ 13-16.

15 In Mr. Lison's conversations with Mr. Kurilich, Mr. Kurilich stated that he understood the  
16 standing issue raised, and did not know why he was told Mr. Ellis was a Class Member but would  
17 attempt to find out. Lison Decl., ¶ 13-14. Mr. Kurilich also agreed to accept service of a subpoena  
18 on behalf of Mr. Ellis and to present Mr. Ellis for a deposition on April 9, 2015 in San Francisco so  
19 long as Plaintiff's counsel did not object to Mr. Kurilich appearing at the deposition telephonically.  
20 Lison Decl., ¶ 14-16. Mr. Kurilich also confirmed that if he could not get information showing that  
21 Mr. Ellis was a Settlement Class Member before April 9, 2015, that he would withdraw Mr. Ellis'  
22 objection. Lison Decl., ¶ 16.

23 Mr. Lison memorialized his conversations with Mr. Kurilich in an email dated March 30,  
24 2015, and sent it to Mr. Kurilich along with the subpoena for Mr. Ellis' deposition, requesting that  
25 Mr. Kurilich confirm acceptance of the subpoena on behalf of Mr. Ellis. Lison Decl., Ex. 4. In Mr.  
26 Lison's email, he requested Mr. Kurilich to confirm his verbal agreement to accept service of the  
27 subpoena on Mr. Ellis' behalf and produce Mr. Ellis for a deposition on April 9, 2015. *Id.* and Lison  
28 Decl., ¶ 17. Mr. Lison also requested a response from Mr. Kurilich by the following morning of

1 March 31, 2015 given the short turnaround time before the final approval hearing and indicated that  
2 if Mr. Kurilich did not respond, Plaintiff would have no choice but to move for an order compelling  
3 Mr. Ellis' deposition as well as for an expedited show cause hearing on the standing issue. *Id.*

4 Mr. Kurilich did not respond to Mr. Lison's email. Lison Decl., ¶ 18. Therefore, on March  
5 31, 2015, Mr. Lison called and left a message with Mr. Kurilich at the same telephone number he  
6 had used to speak with Mr. Kurilich previously, requesting confirmation of his acceptance of the  
7 subpoena, and forwarded his same message to Mr. Kurilich's same email address. Lison Decl., ¶ 19.  
8 As of the filing of this motion, Mr. Kurilich has failed to return Mr. Lison's phone call or to reply to  
9 Mr. Lison's emails. Lison Decl., ¶¶ 18-19. Mr. Kurilich's failure to respond to Mr. Lison's written  
10 communications confirming his acceptance of the subpoena of Mr. Ellis, and Mr. Ellis' agreement to  
11 appear at a deposition on April 9, 2015 necessitates this motion.

### 12 **III. ARGUMENT**

#### 13 **A. Mr. Ellis' deposition is necessary and warranted**

14 The issue of Mr. Ellis' Settlement Class Member status is critical, as only Settlement Class  
15 Members have standing to object to the Settlement. *Grannan v. Alliant Law Grp., P.C.*, 2012 WL  
16 216522, at \*9 (N.D. Cal. Jan. 24, 2012) (Lloyd, M.J.) (*citing San Francisco NAACP v. San*  
17 *Francisco Unified School District*, 59 F.Supp.2d 1021, 1033 (N.D.Cal.1999)) ("Under Fed.R.Civ.P.  
18 23(e)(5), only class members have standing to object to a settlement on behalf of the class.") *See*  
19 *also In re Apple Inc. Sec. Litig.*, 2011 WL 1877988, at \*3 fn. 4 (N.D. Cal. May 17, 2011) (Fogel, J.)  
20 (*citing San Francisco NAACP*, 59 F.Supp.2d at 1032) (an objector that fails to provide evidence to  
21 show he is a class member has no standing to object); *Moore v. Verizon Commc'ns Inc.*, 2013 WL  
22 450365, at \*4 (N.D. Cal. Feb. 5, 2013) (*citing Californians for Disability Rights v. Cal. Dept. of*  
23 *Transp.*, 2010 WL 2228531, at \*8 (N.D. Cal. 2010)) ("non-class members have no standing to object  
24 to the settlement of a class action") (additional citations omitted).

25 Mr. Ellis' counsel, Mr. Kurilich, is well aware that a putative objector must be a class  
26 member with standing to object to a settlement. Indeed, just 6 weeks ago in this District, Mr.  
27 Kurilich had another client's putative objection to another class action settlement stricken for lack of  
28 standing. *See Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at \*10 (N.D. Cal. Feb. 20,

1 2015) (finding Brittany Ference, represented by Matthew Kurlich [*sic*], “failed to establish [her]  
2 standing to challenge the settlement” and had her objection stricken for lack of standing) (citing  
3 cases). In violation of this Court’s Preliminary Approval Order, Mr. Kurilich failed to disclose his  
4 involvement with the *Ghiradelli* case in the objection he filed on behalf of Mr. Ellis.<sup>1</sup> Dkt. No. 588,  
5 Preliminarily Approval, ¶ 28.

6 Putative objectors have the burden to offer evidence to prove they are class members in order  
7 to establish standing to object. *Id.* (citing *In re Hydroxycut Mktg. & Sales Practices Litig.*, 2013 WL  
8 5275618, at \*2 (S.D.Cal. Sept. 17, 2013) (dismissing objection where objector failed to carry burden  
9 to establish standing); *Feder v. Elec. Data Sys. Corp.*, 248 Fed. Appx. 579 \*2 (5th Cir.2007)  
10 (objectors have burden of proving standing; “unsupported assertions of class membership” do not  
11 suffice)).

12 Here, the sole objector to the Settlement, Larry Ellis, is not on the Revised Class List and is  
13 therefore not a Settlement Class Member with standing to object.<sup>2</sup> As it is Mr. Ellis’ burden to  
14 establish that he is a Settlement Class Member with standing to object, it is critical that Plaintiff have  
15 the opportunity to depose Mr. Ellis to determine, factually, his basis for claiming he is a Settlement  
16 Class Member and whether there is any possibility that he is a Settlement Class Member despite not  
17 being on the Revised Class List.

18 Ordering Mr. Ellis to appear at a deposition is more than reasonable given the circumstances  
19 here. First, Preliminary Approval ordered all putative objectors to make themselves available for a  
20 deposition. Dkt. No. 588, Preliminarily Approval, ¶ 31. The Ninth Circuit has approved such

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21  
22 <sup>1</sup> This is only one of several cases in which Mr. Kurilich represented an objector which he did not  
23 disclose in the objection he filed on behalf of Mr. Ellis. However, as the other cases are not relevant  
to this motion, Plaintiff will not address them at this time.

24 <sup>2</sup> Mr. Ellis also failed to follow this Court’s order to provide dates he could be available for a  
25 deposition, and details about his counsel’s prior representation of class action objectors in other  
26 actions. Compare Preliminary Approval, Dkt. No. 588 at ¶¶ 28 and 31 with Mr. Ellis’ Objection,  
27 Dkt. No. 598 at 4-5 (objecting to providing dates for a deposition and information related to prior  
28 objections by Mr. Ellis or his counsel). Failure of Mr. Ellis to follow this Court’s order regarding the  
procedures to object is a second basis why Mr. Ellis has no standing to object to the settlement.  
*Custom LED, LLC v. eBay, Inc.*, 2014 WL 2916871, at \*6 (N.D. Cal. June 24, 2014) (citing *San  
Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F.Supp.2d 1021, 1028 (N.D.Cal.1999)).

1 requirement that an objector be available for a deposition as being within the discretion of the  
2 District Court despite Mr. Ellis' objection thereto. *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918,  
3 926 (9th Cir. 2014) (vacated on other grounds) (“[t]he district court also did not abuse its discretion  
4 in approving the settlement term that objectors be available for depositions.”) Second, courts  
5 routinely order depositions of putative class members when standing is a question. *See, e.g., In re*  
6 *Netflix Privacy Litig.*, No. 5:11-CV-00379-EJD, 2013 WL 6173772, at \*2 (N.D. Cal. Nov. 25, 2013)  
7 (citing *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D.Cal.2012)) (“[A]n  
8 objector who voluntarily appears in litigation is properly subject to discovery.... Discovery  
9 regarding objections to a settlement agreement may be used to seek information regarding the  
10 objector's standing, the bases for the objections, his role in objecting to this and other class  
11 settlements, and his relationships with the counsel that may affect the merits of the objection.”).  
12 Indeed, where standing is a question, discovery can be taken even after final approval of a settlement  
13 if the putative objector appeals. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531,  
14 533 (N.D. Cal. 2012) (quoting *In re Intel Securities Litigation*, 596 F.Supp. 226, 233 (N.D.Cal.1984),  
15 *aff'd*, 791 F.2d 672 (9th Cir.1986)) (“it is well settled that following a notice of appeal, the Court  
16 retains jurisdiction ‘to preserve the integrity of this Court's judgments in general, and specifically to  
17 protect the Court's final judgment ....’”).

18 Thus, even if the Court had not issued its Order requiring putative objectors such as Mr. Ellis  
19 to make themselves available for a deposition, one would be warranted here because the evidence  
20 shows Mr. Ellis has no standing to object.

21 Mr. Ellis also should be ordered to provide whatever evidence he has that would prove he is a  
22 Class Member with standing to object to the Settlement by April 9, 2015 or whatever date is set for  
23 his deposition by this Court. This will allow Plaintiff the opportunity to review, evaluate, and  
24 respond to any new facts Mr. Ellis presents regarding his standing prior to the April 17, 2015  
25 deadline to file a response to his objection.

26 B. An evidentiary hearing to show cause why Mr. Ellis has standing is warranted

27 After Plaintiff deposes Mr. Ellis to learn the facts why Mr. Ellis believes he is a Settlement  
28 Class Member, the Court should hold an evidentiary hearing at which Mr. Ellis can appear to present



1 any evidence he has to show he is a Settlement Class Member despite not being on the Revised Class  
2 List that identifies all Settlement Class Members. Plaintiff requests that this hearing occur on April  
3 24, 2015 at 9:00 a.m., the same date and time as the Final Fairness Hearing.

4 Such evidentiary hearing is warranted here for the Court to rule whether Mr. Ellis has  
5 standing to object before considering the merits of Mr. Ellis' objection. *See, e.g., Seaside Civic*  
6 *League, Inc. v. United States Dep't of Hous. & Urban Dev.*, No. C-14-1823-RMW, 2014 WL  
7 5281031, at \*1 (N.D. Cal. Oct. 15, 2014) (Whyte, D.J.) (dismissing action after evidentiary hearing  
8 to determine standing issues). Further, Mr. Ellis should be ordered to provide this Court (and  
9 counsel of record) with whatever evidence he has to prove he is a Settlement Class Member with  
10 standing to object to the Settlement before April 17, 2015, one-week prior to the Final Fairness  
11 Hearing, or if Mr. Ellis' deposition occurs before then at his deposition. Likewise, at that time,  
12 Plaintiff will submit to the Court declarations attesting to the facts why Mr. Ellis is not a Class  
13 Member. At the hearing, Plaintiff will provide the Court with the supporting evidence attested to in  
14 the declarations for the Court to independently verify Mr. Ellis' lack of standing to be a Settlement  
15 Class Member. As Mr. Ellis has been placed on notice of his lack of standing to object to this  
16 Settlement, if he proceeds and cannot prove that he has standing to object, Plaintiff requests the  
17 Court also ask Mr. Ellis to be prepared to show cause why he should not be held responsible for the  
18 costs Plaintiff will incur in deposing Mr. Ellis as well as the costs of bringing any motions related to  
19 the issue.

## 20 **II. CONCLUSION**

21 For the reasons stated above, the Court should Order Mr. Ellis to appear at a deposition on  
22 April 9, 2015 at 12:00 p.m. at One California Street, Suite 900, San Francisco, California, or on  
23 another date set by the Court before April 17, 2015 when Plaintiff must provide any supplemental  
24 briefing in support of final approval of the Settlement. The Court should that Mr. Ellis file with the  
25 Court and provide to Plaintiff any declaration and evidence he contends bears on the issue of  
26 whether Mr. Ellis is a Settlement Class Member before April 17, 2015. If Mr. Ellis' deposition  
27 occurs before April 17, 2015, then Mr. Ellis shall provide to Plaintiff's counsel any such declaration  
28 and evidence at Mr. Ellis' deposition. The Court should also order Mr. Ellis, or his counsel Matthew

1 Kurilich, to appear before the Court on April 24, 2015 for an evidentiary hearing to present facts  
2 meeting Mr. Ellis' burden to show how he is a Settlement Class Member with standing to object to  
3 the Settlement. At the hearing, Plaintiff will provide the Court with the information from EA and  
4 Chase that shows Mr. Ellis is not a Settlement Class Member. Plaintiff requests that this evidentiary  
5 hearing be held on April 24, 2015 immediately prior to proceeding with the hearing on final  
6 approval of the Settlement on the same date.

7 Dated: April 2, 2015

8 **FEINSTEIN DOYLE PAYNE**  
9 **& KRAVEC, LLC**

**KELLER ROHRBACK L.L.P.**

10 By: /s/ Joseph N. Kravec, Jr.  
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21 ***Co-Lead Trial Counsel and Settlement Class Counsel***

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I am employed in the County of Allegheny, State of Pennsylvania. I am over the age of 18 and not a party to the within action. My business address is 429 Forbes Avenue, Allegheny Building, 17th Floor, Pittsburgh, PA 15219.

**NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING OBJECTOR LARRY  
ELLIS TO COMPLY WITH THE COURT'S ORDER PRELIMINARILY APPROVING  
SETTLEMENT AND APPEAR FOR HIS DEPOSITION AND SETTING A HEARING TO  
SHOW CAUSE WHY LARRY ELLIS HAS STANDING TO OBJECT**

I declare that I am admitted *pro hac vice* in this action.

Executed on April 2, 2015, at Pittsburgh, Pennsylvania.

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Notice of Motion and Motion for Order Requiring Objector Larry Ellis to Comply with the Court's Order Preliminarily Approving Settlement and Appear for His Deposition and Setting a Hearing to Show Cause Why Larry Ellis has Standing to Object;  
Case No. 5-08-CV-00868 (RMW)